

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MELVIN JONES, JR., ) 1:05-CV-0148 OWW DLB  
Plaintiff, ) MEMORANDUM OPINION AND ORDER  
v. ) DENYING MOTION TO DISMISS,  
MICHAEL A. TOZZI et al., ) DENYING MOTION TO STRIKE,  
Defendants. ) DENYING MOTION FOR MORE  
DEFINITE STATEMENT, AND  
DENYING MOTION FOR SANCTIONS.

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**I. INTRODUCTION**

Before the court for decision are two motions filed by Defendant John Hollenback: (1) a motion to dismiss the second amended complaint for failure to state a claim and (2) a motion for sanctions, which alleges that Plaintiff is fabricating evidence. This case, the fourth filed in this court by Plaintiff Melvin Jones concerning a family law dispute previously heard in state court, was transferred to the undersigned judge on March 16, 2005, as a related case. See Doc. 15, filed March 21, 2005.

**II. PROCEDURAL HISTORY**

This case arises out of a child custody dispute between Plaintiff and Kea Chhay, the mother of Plaintiff's minor child. The case was first filed in Santa Clara Superior Court, but was

1 later transferred to Stanislaus County. Additional background  
2 concerning the state proceedings is set forth in various  
3 memorandum opinions in this case and related cases.<sup>1</sup>

4 Plaintiff filed his initial complaint on February 3, 2005.  
5 Doc. 1. Then, prior to the filing of any responsive pleading by  
6 Defendant, Plaintiff filed a first amended complaint on March 3,  
7 2005. Doc. 7. The first amended complaint named as defendants:  
8 Michael A. Tozzi, the Executive Officer of Stanislaus County  
9 Superior Court; Superior Court Judge Marie Sovey-Silveria; and  
10 attorneys Leslie Jensen and John Holenback.

11 Defendants Tozzi and Silveria moved to dismiss this  
12 complaint on March 9, 2005.<sup>2</sup> Doc. 8. Plaintiff opposed this  
13 motion, Doc. 13, filed Mar. 14, 2005, and moved for default  
14 judgment against defendants Jensen and Hollenback. Doc. 14,  
15 filed Mar. 14, 2005. Plaintiff then (improperly) filed an  
16 additional "counter motion" in opposition to Defendants Tozzi and  
17 Silveria's motion to dismiss, along with a motion to amend the  
18 complaint a second time. Doc. 16, filed Mar. 24, 2005. This  
19 motion to amend is still pending. Four days later, on March 28,  
20 2005, Plaintiff lodged yet another "second amended complaint" to  
21 "supercede" the second amended complaint that was attached to his  
22 motion for leave to amend. Doc. 19, filed Mar. 28, 2005.

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23  
24 <sup>1</sup> See *Jones v. California*, 1:04-CV-065676; *Jones v.*  
25 *Strangio*, 1:04-CV-06567; and *Jones v. Strangio*, 1:05-CV-00410.

26 <sup>2</sup> On April 20, 2005, Defendants Jensen and Hollenback  
27 filed a motion to join the motion to dismiss filed by Defendants  
28 Tozzi and Sovey-Silveria. Docs. 25, 26 & 27. Their motion was  
not set for hearing, however, because it was improperly noticed.  
See Doc. 30, filed April 20, 2005.

1 On March 18, 2005, the district court issued an order  
2 dismissing Plaintiffs related case, *Jones v. Strangio*. See Doc.  
3 72, 1:04-cv-06567. In light of that dismissal, the district  
4 court ordered Plaintiff to show cause why this case should not be  
5 dismissed as well. Doc. 18, filed Mar. 29, 2005. Plaintiff  
6 responded to the order to show cause on April 20, 2005. Doc. 29.  
7 At the same time, Plaintiff filed yet another proposed amended  
8 complaint intended to supercede the complaint lodged on March 24,  
9 2005. See Proposed Second Amended Complaint lodged Apr. 20,  
10 2005. This complaint contained numerous new allegations that  
11 Defendants made racially derogatory remarks to plaintiff as part  
12 of a conspiracy to violate his constitutional rights in  
13 contravention of 42 U.S.C. §§ 1981, 1985, and 1986.

14 A memorandum opinion and order dated May 11, 2005 dismissed  
15 Defendants Tozzi and Silveria, denied Plaintiff's motion for  
16 default judgment against Defendants Jensen and Hollenback, and  
17 denied Plaintiff's motion for leave to amend the complaint a  
18 second time. Doc. 47.

19 On June 22, 2005, the district court granted Defendants  
20 Jensen and Hollenback's motion to dismiss, but afforded Plaintiff  
21 one final opportunity to amend the complaint. Doc. 61. A  
22 separate memorandum opinion, dated June 29, 2005, denied  
23 Plaintiffs' April 9, 2005 motion for sanctions. Doc. 65.

24  
25 On July 6, 2005, Plaintiff voluntarily dismissed Defendant  
26 Jensen from the case. Doc. 66. Plaintiff then filed a second  
27 amended complaint alleging that Defendant Hollenback directed  
28 racially derogatory remarks at Plaintiff with the goal of

1 deterring Plaintiff's participation in proceedings related to  
2 Plaintiff's family law case. See Doc. 67, filed July 6, 2005.

3 Defendant Hollenback now moves to dismiss the second amended  
4 complaint on a variety of grounds. Doc. 78, filed Sept. 8, 2005.  
5 Defendant Hollenback also moves for sanctions, alleging that  
6 Plaintiff made false statements in his amended complaint. Doc.  
7 91, filed Sept. 27, 2005.

8  
9 **III. SUMMARY OF THE COMPLAINT**

10 The second amended complaint alleges that Defendant  
11 Hollenback became involved with Plaintiff's family law dispute in  
12 December 2003 as counsel for Ms. Chhay. Doc. 67 at ¶44.  
13 Plaintiff filed contempt charges against Ms. Chhay in early 2004.  
14 *Id.* at ¶ 45. Plaintiff alleges that on April 22, 2004, Defendant  
15 Hollenback told Plaintiff that he "called the Stanislaus County  
16 Housing Authority and told them what a lazy low-life black piece  
17 of shit you are... you get nigger justice." *Id.* at ¶ 47.  
18 Plaintiff also alleges that Defendant Hollenback stated that "he  
19 would knock the teeth out of his black greasy face...and rattle  
20 them out of his jive-monkey ass if he showed up for the contempt  
21 hearings." *Id.* at ¶48. Plaintiff asserts that "as a direct and  
22 proximate cause of the defendant's threats, [he] withdrew [the]  
23 contempt charges...." *Id.* at ¶ 51. The complaint further  
24 alleges that the statute of limitations on the contempt charges  
25 expired in July 2004. *Id.* at ¶ 54. As a result, "Mr. Jones'  
26 access to the judicial system was deprived."

27 The complaint alleges that Defendants alleged conduct  
28 deprived Plaintiff of his civil rights in violation of 42 U.S.C.

§ 1981 in seven different ways. Specifically, the complaint alleges that Defendant:

- (1) deprived Plaintiff of his "federal right to sue on account of his race and ethnicity";
- (2) deprived Plaintiff of his federal right to enforce contracts on account of his race and ethnicity";
- (3) deprived Plaintiff of his "federal right to be a party to proceedings on account of his race and ethnicity";
- (4) deprived Plaintiff of his "federal right to give evidence at proceedings on account of his race and ethnicity";
- (5) deprived Plaintiff of his "federal right to full benefit of proceedings on account of his race and ethnicity";
- (6) deprived Plaintiff of his "federal right to equal benefit of all proceedings on account of his race and ethnicity"; and
- (7) deprived Plaintiff of his "federal right to equal benefit of all laws on account of his race and ethnicity."

*Id.* at ¶64-77.

#### **IV. STANDARD OF REVIEW FOR A MOTION TO DISMISS**

In deciding whether to grant a motion to dismiss, a court must "take all of the allegations of material fact stated in the complaint as true and construe them in the light most favorable

1 to the nonmoving party." *Rodriguez v. Panayiotou*, 314 F.3d 979,  
2 983 (9th Cir. 2002). In general, "a *pro se* complaint will be  
3 liberally construed and will be dismissed only if it appears  
4 beyond doubt that the plaintiff can prove no set of facts in  
5 support of his claim which would entitle him to relief." *Pena v.*  
6 *Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). However, "a liberal  
7 interpretation of a [pro se] complaint may not supply essential  
8 elements of the claim that were not initially pled." *Id.*

9  
10 **V. LEGAL ANALYSIS**

11 **A. Defendants arguments concerning the Plaintiff's "Notice**  
12 **of Withdrawal [of] Contempt Without Prejudice."**

13 Defendant first argues that Plaintiff should be estopped  
14 from alleging that he withdrew the contempt charges because of  
15 Hollenback's threats. In support of this argument, Defendant  
16 points to a document filed by Mr. Jones in his family law case  
17 entitled "Notice of Withdrawal of Contempt Hearing Without  
18 Prejudice."<sup>3</sup> The Notice states:

19 I Melvin Jones hereby declare that I am the Plaintiff  
20 and moving party and Kea Chhay is the Defendant. I  
21 hereby request that the amended contempt charges #23-25  
be withdrawn without prejudice for the following  
reasons:

22 1.) Due to the matter(s) set-forth in my letter to the  
23 Honorable Judge Wray Ladine dated 4-23-04, sent

24 <sup>3</sup> Defendant requests that the court take judicial notice  
25 of this document. It is appropriate for the district court to  
26 take judicial notice of this pleading filed in state court, for  
its existence, but not for the truth of its contents, pursuant to  
27 Federal Rule of Civil Procedure 201.

28 Despite repeatedly referencing this document and making it  
the subject of a request for judicial notice, however, Defendant  
has failed to attach a copy of the Notice to any court filing in  
this case. Mr. Jones appears to have attached a copy of the  
Notice to his Opposition, however. Doc. 87, Attachment E.

regular mail on 4-23-04 and sent via Express mail  
#ER 899883487 US.

2.) To allow appropriate time for formal investigation  
by the Commission on Judicial Performance  
regarding matters set forth in said letter and my  
detailed formal complaint.

3.) My overwhelming concern for the safety of myself,  
and my perspective witness' [sic] appearing on my  
behalf.

4.) Due to my concern that further violation(s) of my  
Civil and Constitutional Rights will occur.

I declare under the penalty of perjury and under the  
Laws of the State of California that the foregoing is  
true and correct.

Dated this 7th Day of May, 2004

/s/ Melvin Jones  
Melvin Jones, Jr.  
Plaintiff

Defendants argue that this Notice "fatally contradicts"  
Plaintiff's assertion that he withdrew his contempt claim because  
of the Mr. Hollenback's alleged derogatory statements. But  
Defendants misunderstand the nature of a motion to dismiss. At  
this stage, the district court must accept the allegations of the  
complaint as true. Unless converted into a summary judgment  
motion, after notice, the court does not weigh or determine  
credibility of evidence. Accepted as true, the Notice is not  
inconsistent with the allegation in the second amended complaint  
that Plaintiff withdrew the contempt charges because of  
Hollenback's threats. Specifically, the Notice acknowledges that  
among the reasons for Plaintiff's withdrawal of the contempt  
claims are his "overwhelming concern for the safety of [himself],  
and [his] perspective witness..." and his "concern that further  
violation(s) of [his] Civil and Constitutional Rights will

1 occur." This general statement of reasons is arguably a  
2 reference to the alleged comments/threats made by Mr. Hollenback.  
3 Although the Notice presented by Defendants is relevant to the  
4 weight a finder of fact might afforded Plaintiff's allegations,  
5 it does not on its own require dismissal.<sup>4</sup>

6  
7 **B. 42 U.S.C. § 1981**

8 Plaintiff's second amended complaint relies exclusively upon  
9 42 U.S.C. § 1981 to establish subject matter jurisdiction.  
10 Section 1981 provides:

11 (a) Statement of equal rights.

12 All persons within the jurisdiction of the United  
13 States shall have the same right in every State and  
14 Territory to make and enforce contracts, to sue, be  
15 parties, give evidence, and to the full and equal  
16 benefit of all laws and proceedings for the security of  
17 persons and property as is enjoyed by white citizens,  
18 and shall be subject to like punishment, pains,  
19 penalties, taxes, licenses, and exactions of every  
20 kind, and to no other.

21 (b) "Make and enforce contracts" defined

22 For purposes of this section, the term "make and  
23 enforce contracts" includes the making, performance,  
24 modification, and termination of contracts, and the  
25 enjoyment of all benefits, privileges, terms, and  
26 conditions of the contractual relationship.

27 (c) Protection against impairment

28 The rights protected by this section are protected  
against impairment by nongovernmental discrimination  
and impairment under color of State law.

42 U.S.C. § 1981. This provision prohibits private individuals

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<sup>4</sup> This conclusion is not an endorsement of the veracity  
or plausibility of Plaintiff's claims. As the district court has  
stated in the past, this Plaintiff has exhibited a tendency to  
change or supplement his factual submissions over time with  
previously unasserted matters in an apparent effort to evade  
dismissal.



1 as well as state actors from discriminating against an individual  
2 on the basis of his or her race with respect to that individual's  
3 right "to sue, be parties, give evidence, and to the full and  
4 equal benefit of all laws..." See *General Bldg. Contractors*  
5 *Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982).

6 "Section 1981 cannot be construed as a general proscription  
7 of racial discrimination... for it expressly prohibits  
8 discrimination only in the **making and enforcement of contracts.**"  
9 *Patterson v. McLean Credit Union*, 491 U.S. 164, 176  
10 (1989) (emphasis added); see also *Georgia v. Rachel*, 384 U.S. 780,  
11 791 (1966) ("The legislative history of the 1866 Act clearly  
12 indicates that Congress intended to protect a limited category of  
13 rights"):

14 In this respect, [Section 1981] prohibits  
15 discrimination that infects the legal process in ways  
16 that prevent one from enforcing contract rights, by  
17 reason of his or her race, and this is so whether this  
18 discrimination is attributed to a statute or simply to  
19 existing practices. It also covers wholly private  
20 efforts to impede access to the courts or obstruct  
21 nonjudicial methods of adjudicating disputes about the  
22 force of binding obligations, as well as discrimination  
23 by private entities, such as labor unions, in enforcing  
24 the terms of a contract.

25 *Patterson*, 491 U.S. at 177 (1989).

26 Here, Plaintiff suggests that bringing a contempt proceeding  
27 in state court against Ms. Chhey was an effort to enforce the  
28 family law visitation agreement he and Ms. Chhey signed. Neither  
party offers legal authority supporting or refuting the  
proposition that such a contract is covered by section 1981.  
Legal authority applicable to this issue suggests that a wide  
range of contracts are covered by the provision. See *Runyon v.*  
*McCrary*, 427 U.S. 160 (1976) (section 1981 reached discrimination

1 in private education where private schools denied admission to  
2 minority children thereby interfering with parents' right to  
3 contract for educational services).

4 In order to establish a claim under § 1981, it must be shown  
5 that "(1) the plaintiff is a member of a racial minority; (2) an  
6 intent to discriminate on the basis of race by the defendant; and  
7 (3) the discrimination concerned one or more of the activities  
8 enumerated in the statute (i.e., the right to make and enforce  
9 contracts, sue and be sued, give evidence, etc.)." *Mian v.*  
10 *Donaldson, Lufkin & Jenrette Secs. Corp.*, 7 F.3d 1085, 1087 (2d  
11 Cir. 1993); see *Green v. State Bar of Tex.*, 27 F.3d 1083, 1086  
12 (5th Cir. 1994).

13 Proof of these elements of a prima facie case of  
14 discrimination in violation of 42 U.S.C. § 1981 is not required  
15 at the pleading stage. See *Swierkiewicz v. Sorema*, 534 U.S. 506,  
16 510-511 (2002) (there is no general requirement that the plaintiff  
17 plead facts establishing a prima facie case of discrimination).  
18 Nevertheless, the complaint does set forth factual allegations  
19 which address each of the prima facie elements. It is not  
20 disputed that Plaintiff is African American, satisfying the first  
21 element. Plaintiff alleges that on April 22, 2004, Defendant  
22 Hollenback told Plaintiff that he "called the Stanislaus County  
23 Housing Authority and told them what a lazy low-life black piece  
24 of shit you are... you get nigger justice." *Id.* at ¶47.  
25 Plaintiff also alleges that Defendant Hollenback stated that "he  
26 would knock the teeth out of his black greasy face...and rattle  
27 them out of his jive-monkey ass if he showed up for the contempt  
28 hearings." *Id.* at ¶48. Plaintiff asserts that "as a direct and

1 proximate cause of the defendant's threats, [he] withdrew [the]  
2 contempt charges...." *Id.* at ¶ 51. These alleged facts, which  
3 the court must assume to be true for the purposes of this motion,  
4 suggest that Defendant intended to interfere with Plaintiff's  
5 access to the court system to give evidence and the racially  
6 derogatory nature of the remarks are evidence of discriminatory  
7 intent.

8 Rather than addressing the allegations in the complaint  
9 head-on, Defendant "categorically denies" making any such  
10 statements to Plaintiff, but appears to admit that he called  
11 Plaintiff a low life. Doc. 78 at 7. Defendant then proceeds to  
12 frame his entire legal argument<sup>5</sup> around his own version of the  
13 statement, rather than the statement as alleged in the complaint.  
14 This is not helpful. On a motion to dismiss, a district court is  
15 not at liberty to disregard the allegations in the complaint on  
16 the basis of conflicting evidence -- no matter how credible the  
17 conflicting evidence may be. Such disputes are more  
18 appropriately resolved on summary judgment or at trial.

19 Defendant also argues that the complaint does not allege  
20 "discrimination" as that term is commonly defined, citing various  
21 cases concerned with disparate treatment. *Id.* at 9. Defendant  
22 exhibits an almost total misunderstanding of federal civil rights  
23 law. It is well established law that explicit racial slurs

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24  
25 <sup>5</sup> Specifically, Defendant argues that slander is not a  
26 constitutional tort which would normally form the basis for a  
27 civil rights violation. However, the complaint alleges more than  
28 slander. Plaintiff suggests that Defendant threatened him, using  
language suggesting a race-based motive behind those threats, in  
a manner that interfered with Plaintiff's access to the judicial  
system.

1 directly connected with an allegedly discriminatory act are  
2 evidence of discrimination. *E.E.O.C. v. Pape Lift, Inc.*, 115  
3 F.3d 676, 679, 684 (9th Cir. 1997) (evidence of age discrimination  
4 existed where employer "just kept saying, 'I don't think Bill  
5 fits the mold of the young, aggressive manager.'"). Plaintiff's  
6 complaint is sufficient to state a claim under section 1981.

7  
8 **C. Motion to Strike Certain Paragraphs from the Complaint  
as Surplussage.**

9 Defendants move to strike the following paragraphs from  
10 Plaintiff's amended complaint as being irrelevant and unrelated  
11 to any substantive claims : ¶¶ 4, 8-10, 12-22, 23, 27-43, 47, 49,  
12 52. Many of these paragraphs contain somewhat relevant  
13 background information, while others allege facts that are  
14 clearly relevant to the claims alleged in the complaint. For  
15 example, paragraph 47 contains the allegation that "On 4/22/2004  
16 defendant Hollenback made statements to Mr. Jones that, "he  
17 called the Stanislaus County housing Authority and told them what  
18 a lazy low-life black piece of shit you are... you get nigger  
19 justice." It is not clear whether the Defendant's paragraph  
20 references may refer to a different version of the complaint, or  
21 whether there is some other explanation for Defendant's request  
22 that the court strike substantive allegations from the complaint.  
23 Absent such clarification, the motion to strike must be **DENIED**.

24 //

25 //

26 //

27 //

**D. Motion for Sanctions**

Defendant moves for sanctions on the ground that Plaintiff has made false statements in his complaint. Along with the motion for sanctions, Defendant presents his own affidavit stating that he "did not make either of the statements claimed by Mr. Jones." Doc. 91, Decl. of John H. Hollenback. Defendant also asserts that he "does not use in his private or public speech any language that is in any manner derogatory toward African Americans or members of any other minority ethnic group [with the] possible exception [of his] tendency to speak disparagingly of 'rich white folk' and their various foibles." *Id.*

There is, clearly, a factual dispute between the parties as to what, if any, comments were exchanged between them. This is not a matter to be resolved in a motion for sanctions. The motion for sanctions is **DENIED**.

**VI. CONCLUSION**

For the reasons set forth above Defendant Hollenback's:

- (1) Motion to dismiss is **DENIED**;
- (2) Motion to strike is **DENIED**; and
- (3) Request for sanction is **DENIED**.

**SO ORDERED.**

Dated: October 20, 2005

/s/ OLIVER W. WANGER

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**Oliver W. Wanger**  
**UNITED STATES DISTRICT JUDGE**